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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

FEB 24 2004

File: WAC 02 198 50677 Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a dental office. It seeks to employ the beneficiary permanently in the United States as a dental assistant. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director ruled that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on December 22, 1998. The proffered wage as stated on the Form ETA 750 is \$14.50 per hour, which equals \$30,160 per year.

With the petition counsel submitted the petitioner's 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns. Counsel submitted no other evidence with the petition pertinent to the petitioner's ability to pay the proffered wage.

The 1998 return shows that the petitioner declared a loss of \$6,192 as its taxable income before net operating loss deduction

and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$63,200 and current liabilities of \$37,360, which yields net current assets of \$25,840.

The 1999 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$9,456 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$91,461 and current liabilities of \$36,467, which yields net current assets of \$54,994.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$0 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on September 3, 2002, requested additional evidence pertinent to that ability.

Pursuant to 8 C.F.R. § 204.5(g)(2), the Service Center requested evidence, in the form of either copies of annual reports, federal tax returns, or audited financial statements, that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director noted that, if the petitioner employs 100 or more workers, then a statement from a financial officer would suffice to establish the petitioner's ability to pay the proffered wage.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of \$117,888 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted 1999, 2000, and 2001 Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during those years. Those forms show that the petitioner paid the beneficiary \$27,665.02, \$31,499.60, and \$33,494.77, during those years, respectively.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on November 19, 2002, denied the petition.

On appeal, counsel argues that the amount of the petitioner's wage expenses during the years since the priority date shows its ability to pay the proffered wage. Counsel states that the proffered wage of \$14.50 per hour equals \$27,840 annually and that, therefore, the wages the petitioner paid to the beneficiary during the salient years also shows its ability to pay the proffered wage. Counsel argues that the fact that the petitioner paid wages during the salient years, to the beneficiary and to others, indicates its ability to pay the proffered wage.

Further, counsel argues that the net income shown on the petitioner's tax returns is not an accurate indicator of the petitioner's ability to pay the proffered wage.

With the appeal, counsel provided a copy of a 1998 W-2 form showing that the petitioner paid the beneficiary \$28,059.80 during that year.

Counsel's reliance on wages paid by the petitioner to employees other than the beneficiary is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹ or otherwise increased its net income², the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

Counsel argues that the petitioner's tax returns do not show the true financial condition of the corporation. Pursuant to 8 C.F.R. § 204.5(g)(2), however, the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely upon tax returns to demonstrate its ability to pay the proffered wage, but chose to. The petitioner might, in the alternative, have provided annual reports or audited financial statements, but chose not to. Having made this election, the petitioner shall not now be heard to argue, through counsel, that its tax returns, with which it chose to demonstrate its ability to pay the proffered wage, are a poor indicator of that ability.

¹ The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

² The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

Counsel correctly observed that the W-2 forms in this case show that the petitioner paid wages to the beneficiary during the salient years. If those wages were equal to the total of the proffered wage, that would demonstrate the ability of the petitioner to pay the proffered wage during those years. The proffered wage, \$14.50 per hour, is equal to \$30,160 per year, notwithstanding counsel's assertion that it equals some other amount. The petitioner must show the ability to pay the proffered wage beginning on the priority date. Having paid wages to the beneficiary, the petitioner must show the ability to pay the proffered wage minus the amount it actually paid to the beneficiary during salient years.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the INS, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the INS (now CIS) should have considered income before expenses were paid rather than net income.

The priority date is December 22, 1998. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1998, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 355 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 10 days. The proffered wage multiplied by 10/365th equals \$826.30, which is the amount the petitioner must show the ability to pay during 1998.

During 1998, the petitioner declared a loss. The petitioner has not shown that it was able to pay the proffered wage out of its income. However, the petitioner ended the year with net current assets of \$25,840, an amount sufficient to pay the salient portion of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during the salient portion of 1998.

During 1999 and ensuing years, the petitioner is obliged to show

the ability to pay the entire proffered wage, minus the wages it actually paid to the beneficiary during those years.

During 1999, the petitioner paid the beneficiary \$27,665.02. The petitioner must show the ability to pay the \$2,494.98 balance of the proffered wage. During 1999, the petitioner declared taxable income before net operating loss deduction and special deductions of \$9,456. That amount was sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner paid the beneficiary \$31,499.60. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner paid the beneficiary \$33,494.77. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner has demonstrated the ability to pay the proffered wage during each of the salient years. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained.